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17 Joyce Cabalona

18 **UNITED STATES DISTRICT COURT**  
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 **JOYCE CABALONA,  
21 INDIVIDUALLY AND ON  
22 BEHALF OF ALL OTHERS  
23 SIMILARLY SITUATED,**

24 Plaintiff,

25 v.

26 **SMS MARKETING SERVICES,  
27 INC. d.b.a.  
28 EDUCATIONAHEAD.COM,**

29 Defendant.

30 **Case No.:**

31 **CLASS ACTION**

32 **COMPLAINT FOR DAMAGES AND  
33 INJUNCTIVE RELIEF PURSUANT  
34 TO THE TELEPHONE CONSUMER  
35 PROTECTION ACT, 47 U.S.C. § 227,  
36 ET SEQ.**

37 **JURY TRIAL DEMANDED**

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## INTRODUCTION

- 1 2. JOYCE CABALONA (“Plaintiff”) brings this Class Action Complaint for  
3 damages, injunctive relief, and any other available legal or equitable  
4 remedies, resulting from the illegal actions of SMS MARKETING  
5 SERVICES, INC. d.b.a. EDUCATIONAHEAD.COM (hereinafter  
6 “Defendant”) in negligently contacting Plaintiff on Plaintiff’s cellular  
7 telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C.  
8 § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff  
9 alleges as follows upon personal knowledge as to herself and her own acts  
10 and experiences, and, as to all other matters, upon information and belief,  
11 including investigation conducted by their attorneys.
- 12 2. The TCPA was designed to prevent calls like the ones described within this  
13 complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous  
14 consumer complaints about abuses of telephone technology – for example,  
15 computerized calls dispatched to private homes – prompted Congress to pass  
16 the TCPA.”
- 17 3. In enacting the TCPA, Congress intended to give consumers a choice as to  
18 how creditors and telemarketers may call them, and made specific findings  
19 that “[t]echnologies that might allow consumers to avoid receiving such  
20 calls are not universally available, are costly, are unlikely to be enforced, or  
21 place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, §  
22 11. Toward this end, Congress found that:

23 [b]anning such automated or prerecorded telephone calls  
24 to the home, except when the receiving party consents to  
25 receiving the call or when such calls are necessary in an  
26 emergency situation affecting the health and safety of the  
consumer, is the only effective means of protecting  
telephone consumers from this nuisance and privacy  
invasion.

27 *Id.* at § 12;

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4. Congress also specifically found that “the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13.

## **JURISDICTION AND VENUE**

5. This Court has federal question jurisdiction because this case arises out of violation of federal law. 47 U.S.C. §227(b).

6. Venue is proper in the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1391 for the following reasons: (i) Plaintiff resides in the City of San Bruno, County of San Mateo, State of California which is within this judicial district; (ii) the conduct complained of herein occurred within this judicial district; and, (iii) many of the acts and transactions giving rise to this action occurred in this district because Defendant:

- (a) is authorized to conduct business in this district and has intentionally availed itself of the laws and markets within this district;
- (b) does substantial business within this district;
- (c) is subject to personal jurisdiction in this district because it has availed itself of the laws and markets within this district; and,
- (d) the harm to Plaintiff occurred within this district.

## PARTIES

7. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the City of San Bruno, County of San Mateo, State of California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (3).

8. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and at all times mentioned herein was, a corporation incorporated under the laws of the State of New Jersey with a headquarters at 777 Terrace Avenue, Suite

401, Hasbrouck Heights, NJ 07604, and is a “person,” as defined by 47 U.S.C. § 153 (39). Plaintiff alleges that at all times relevant herein Defendant conducted business in the State of California and in the County of San Mateo, and within this judicial district.

## FACTUAL ALLEGATIONS

9. Plaintiff alleges that at all times relevant herein Defendant conducted business in the State of California, County of San Mateo, and within this judicial district.
10. At no time did Plaintiff ever enter into a business relationship with Defendant.
11. Prior to filing this Complaint, Defendant initiated numerous telephone calls from telephone number (510) 957-4239 to Plaintiff's telephone number ending in "3671."
12. Each of these telephone communications constituted telephone solicitations, as defined by 47 U.S.C. § 227(a)(4).
13. Each of Defendant's calls constituted a call that was not for emergency purposes, as defined by 47 U.S.C. § 227(b)(1)(A)(i).
14. Defendant's calls were placed to telephone number assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227(b)(1).
15. Defendant did not have prior written express consent to call Plaintiff and make these telephone solicitations, as defined by 47 U.S.C. § 227(a)(4).
16. On information and belief, Plaintiff believes that Defendant used an "automatic telephone dialing system" (or "ATDS"), as defined by 47 U.S.C. § 227(a)(1) to repeatedly call Plaintiff because Plaintiff was greeted by "dead air" prior to speaking with Defendant.
17. This ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

1 18.These telephone communications by Defendant, or its agent, violated 47  
2 U.S.C. § 227(b)(1).

3 19.Through the aforementioned conduct, Defendant has violated 47 U.S.C.  
4 § 227 et seq.

5 **CLASS ACTION ALLEGATIONS**

6 20.Plaaintiff brings this action on behalf of herself and on behalf of all others  
7 similarly situated (“the Class”).

8 21.Plaaintiff represents, and is a member of the Class, consisting of:

9 All persons within the United States who received any  
10 telephone call/s from Defendant or their agent/s and/or  
11 employee/s, not sent for emergency purposes, to said  
12 person’s cellular telephone made through the use of any  
13 automatic telephone dialing system and/or with an  
artificial or prerecorded message within the four years  
prior to the filing of this Complaint.

14 22.Defendant and its employees or agents are excluded from the Class.

15 Plaintiff does not know the number of members in the Class, but believes the  
16 Class members number in the tens of thousands, if not more. Thus, this  
17 matter should be certified as a Class action to assist in the expeditious  
18 litigation of this matter.

19 23.Plaaintiff and members of the Class were harmed by the acts of Defendant in  
20 at least the following ways: Defendants, either directly or through its agents,  
21 illegally contacted Plaintiff and the Class members via their cellular  
22 telephones by using an ATDS, thereby causing Plaintiff and the Class  
23 members to incur certain cellular telephone charges or reduce cellular  
24 telephone time for which Plaintiff and the Class members previously paid,  
25 and invading the privacy of said Plaintiff and the Class members. Plaintiff  
26 and the Class members were damaged thereby.

27 24.This suit seeks only damages and injunctive relief for recovery of economic  
28 injury on behalf of the Class, and it expressly is not intended to request any

1 recovery for personal injury and claims related thereto. Plaintiff reserves the  
2 right to expand the Class definition to seek recovery on behalf of additional  
3 persons as warranted as facts are learned in further investigation and  
4 discovery.

5 25. The joinder of the Class members is impractical and the disposition of their  
6 claims in the Class action will provide substantial benefits both to the parties  
7 and to the court. The Class can be identified through Defendants' records or  
8 Defendants' agents' records.

9 26. There is a well-defined community of interest in the questions of law and  
10 fact involved affecting the parties to be represented. The questions of law  
11 and fact to the Class predominate over questions which may affect  
12 individual Class members, including the following:

- 13 a) Whether, within the four years prior to the filing of this Complaint,  
14 Defendant or its agents initiated any telephonic communications to the  
15 Class (other than a message made for emergency purposes or made  
16 with the prior express consent of the called party) to a Class member  
17 using any automatic dialing to any telephone number assigned to a  
18 cellular phone service;
- 19 b) Whether Defendant can meet its burden of showing it obtained prior  
20 express consent (i.e., consent that is clearly and unmistakably stated);
- 21 c) Whether Defendant's conduct was knowing and/or willful;
- 22 d) Whether Plaintiff and the Class members were damaged thereby, and  
23 the extent of damages for such violation; and
- 24 e) Whether Defendants and its agents should be enjoined from engaging  
25 in such conduct in the future.

26 27. As a person that received at least one telephonic communication from  
27 Defendant's ATDS without Plaintiff's prior written express consent,  
28 Plaintiff is asserting claims that are typical of the Class. Plaintiff will fairly

1 and adequately represent and protect the interests of the Class in that  
2 Plaintiff has no interests antagonistic to any member of the Class.

3 Plaintiff and the members of the Class have all suffered irreparable harm as  
4 a result of the Defendants' unlawful and wrongful conduct. Absent a class  
5 action, the Class will continue to face the potential for irreparable harm. In  
6 addition, these violations of law will be allowed to proceed without remedy  
7 and Defendants will likely continue such illegal conduct. Because of the  
8 size of the individual Class member's claims, few, if any, Class members  
9 could afford to seek legal redress for the wrongs complained of herein.

10 Plaintiff has retained counsel experienced in handling class action claims  
11 and claims involving violations of the Telephone Consumer Protection Act.

12 A class action is a superior method for the fair and efficient adjudication of  
13 this controversy. Class-wide damages are essential to induce Defendants to  
14 comply with federal and California law. The interest of Class members in  
15 individually controlling the prosecution of separate claims against  
16 Defendants is small because the maximum statutory damages in an  
17 individual action for violation of privacy are minimal. Management of these  
18 claims is likely to present significantly fewer difficulties than those  
19 presented in many class claims.

20 Defendant has acted on grounds generally applicable to the Class, thereby  
21 making appropriate final injunctive relief and corresponding declaratory  
22 relief with respect to the Class as a whole.

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**FIRST CAUSE OF ACTION**  
**NEGLIGENT VIOLATIONS OF THE**  
**TELEPHONE CONSUMER PROTECTION ACT**  
**47 U.S.C. § 227 ET SEQ.**

32. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

33. The foregoing acts and omissions of Defendant constitutes numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

34. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq., Plaintiff and the Class are entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

35. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

## **SECOND CAUSE OF ACTION**

# **KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**

47 U.S.C. § 227 ET SEQ.

36. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

37. The foregoing acts and omissions of Defendant constitutes numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

38. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 et seq, Plaintiff and the Class are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

1 39. Plaintiff and the Class are also entitled to and seek injunctive relief  
 2 prohibiting such conduct in the future.

3 **PRAYER FOR RELIEF**

4 **WHEREFORE**, Plaintiff and the Class Members pray for judgment as  
 5 follows:

6 • Certifying The Class as requested herein;  
 7 • Providing such further relief as may be just and proper.

8 In addition, Plaintiff and The Class Members pray for further judgment as  
 9 follows:

10 **FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF**  
 11 **THE TCPA, 47 U.S.C. § 227 ET SEQ.**

12 • As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1),  
 13 Plaintiff seeks for herself and each Class member \$500.00 in statutory  
 14 damages, for each and every violation, pursuant to 47 U.S.C.  
 15 § 227(b)(3)(B).  
 16 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such  
 17 conduct in the future.  
 18 • Any other relief the Court may deem just and proper.

19 **SECOND CAUSE OF ACTION FOR KNOWING/WILLFUL VIOLATION OF**  
 20 **THE TCPA, 47 U.S.C. § 227 ET SEQ.**

21 • As a result of Defendant's knowing and/or willful violations of 47 U.S.C.  
 22 § 227(b)(1), Plaintiff seeks for herself and each Class member \$1,500.00  
 23 in statutory damages, for each and every violation, pursuant to 47 U.S.C.  
 24 § 227(b)(3)(B).  
 25 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such  
 26 conduct in the future.  
 27 • Any other relief the Court may deem just and proper.

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## TRIAL BY JURY

40. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: April 16, 2015

Respectfully submitted,

## **KAZEROUNI LAW GROUP, APC**

By: s/ ABBAS KAZEROUNIAN  
ABBAS KAZEROUNIAN, ESQ.  
ATTORNEYS FOR PLAINTIFF

[ADDITIONAL PLAINTIFF'S COUNSEL]

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